United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

132

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

F 979

No. 20,994

HARRY GROSS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

EDGAR H. MARTIN
739 Fifteenth Street, N.W.
Washington, D.C. 20005

J. PATRICK HICKEY
918-17th Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Both appointed by this Court)

August 7, 1967.

QUESTIONS PRESENTED

1. The question is whether statements of appellant admitted by the trial court were obtained after arrest or during a period of custodial interrogation where four police officers went to appellant's house at 5:30 A.M., and took him to police headquarters where he was subjected to interrogation including three polygraph examinations for a period of over five hours and placed under guard before the statements were obtained.

2. The question is whether appellant was adequately advised of his constitutional rights where he was not clearly informed that he had a right to remain silent, to have counsel appointed to assist him, and to have counsel present during any interrogation.

3. The question is whether appellant's statements admitted by the trial court were obtained during a period of "unreasonable delay" in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and the Mallory rule where such delay was admittedly for the purpose of obtaining a confession.

4. The question is whether the court should direct an acquittal on a robbery charge where the sole evidence of the essential element of taking consisted of appellant's extra-judicial admission and police testimony that open drawers and an open empty purse were found.

5. The question is whether the trial court should have instructed the jury that the specific intent to steal required for robbery was lacking if the taking was under a claim of right where there was evidence that the alleged taking was under a good faith claim of right and appellant specifically urged this defense theory at the trial and requested an instruction thereon.

INDEX

TABLE OF AUTHORITIES

A. CASES

(Cases chiefly relied upon are marked with an asterisk.)

B. Constitution, Statutes and Rules

C. Miscellaneous

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,994

HARRY GROSS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimes of murder in the second degree (22 D.C. Code §§ 2403) and robbery (22 D.C. Code §§ 2901).

Appellant was found guilty of these charges by a jury verdict returned March 1, 1967. On April 21, 1967, he was sentenced to serve 15 years to life imprisonment on the homicide charge and 5 to 15 years on the robbery charge, the two sentences to run consecutively. Leave was granted appellant to appeal in forma pauperis. Appellant is presently confined at the Lorton Reformatory.

The jurisdiction of this court on appeal is founded on 28 U.S.C. §§ 1291.

STATEMENT OF FACTS*

On January 4, 1966, about 9:30 a.m., Mrs. Madge Mitchell was found strangled in her bed. The maid, Mrs. Mabelle McQuinn (the only other resident of the Mitchell house) found the window in the deceased's second-floor bedroom wide open. (Tr. 39, 42-43, 59-60.) The dresser drawers were pulled open,

---

* Throughout this brief, the transcript of the hearing on the Motion to Suppress will be cited "Mot. Tr."; the transcript of the trial will be cited "Tr."; the supplemental trial transcript will be cited "S. Tr."; and the transcript of closing arguments and charge to the jury as "Arg. Tr."

and a purse was found in the adjoining bathroom, open and containing no money (Tr. 106, 109, 129.)

The following day, January 5, 1966, shortly before 5:30 a.m., Detective Sergeants Wallace and Thornton of the Homicide Squad of the Metropolitan Police Department called on the police radio from their cruiser, requesting that a scout car meet them at 18th Place and C Street, N.E., in the District of Columbia (Mot. Tr. 68-69.) The detectives advised the police dispatcher that they were going to "turn a house up" (Mot. Tr. 95); the house to be "turned up" was 1810 C Street, N.E., the residence of Harry Gross, the appellant.

Officer William V. Colquit, who responded to the call in Scout Car 93, testified that "turn a house up" was "a police term meaning you will go to this particular place and search for a subject" and arrest him "if you can find him". (Mot. Tr. 43.) Sgt. Wallace testified that the phrase meant only that the dispatcher should hold the scout car out of service (Mot. Tr. 95, 105). The full transmission by Sgt. Wallace, as preserved on a recording device

kept by the police department of all radio transmissions, was "Would you hold them out, we are going to turn the house up". The dispatcher responded, "Okay, 93, you will be 10-7 on that assignment,..." (Mot. Tr. 69.) Sgt. Wallace admitted that he was familiar with the expression "10-7", a police radio expression meaning that a car should be held out of service (Mot. Tr. 105.)

Pvt. Colquit and his partner Pvt. Rivers met the two detectives in response to the broadcast. After a brief discussion, one of the detectives (in plain clothes) and one of the officers (in uniform) went to the front of 1810 C St., N.E., with the other two policemen going to the back door of the same address. The purpose behind the officers' splitting up, according to Officer Colquit, was to "cut off all avenues of escape" (Mot Tr. 34.). These were the only exits from the house (Mot. Tr. 6.)[1].

Det. Sgt. Wallace testified that he went to the house to "pick up" the appellant, and bring him

---

[1] The regulations of the Metropolitan Police Department in effect at the time were received in evidence, and provide that both officers are not to leave a scout car at the same time "except in cases of grave emergencies where the conditions are such as to demand physical presence of all members of the unit. . . ." M.P.D.C. Regulations, Chapter 25, Section 6. (Mot. Tr. 117-118).

to police headquarters for questioning about the Mitchell slaying. (Mot. Tr. 94-96, 98). Officer Colquit testified that he and his partner were there to assist the Homicide Detectives in apprehending Gross. (Mot. Tr. 34, 45). All four officers were armed, and Pvt. Colquit unsnapped the "keeper" on the holster of his service revolver. (Mot. Tr. 34-35, 121.)

Sgt. Wallace explained the early hour for their visit on the basis that Sgt. Jack L. Buch, the officer in charge of the case, had been advised that Gross worked on a construction job, and would be leaving for work at an early hour. (Mot. Tr. 94, 124-125.) However, Sgt. Buch admitted that no one had told him Gross was then employed in construction work, and no one indicated that Gross went to work at 5:30 a.m. (Mot. Tr. 80, 82-83, 87-88). In fact, Gross was unemployed and had not worked on construction for some time. (Mot. Tr. 18, 124-25.)

No attempt was made to telephone the Gross residence before the officers went there, and no request was made to Gross to come in to headquarters at 8:30 when Sgt. Buch would report for duty. (Mot.

Tr. 83, 125). Sgt. Buch did not ask Sgt. Wallace to question Gross at 1810 C St. because, in Sgt. Buch's words, "We don't take statements at people's homes". (Mot. Tr. 90.)

After all four officers were admitted to the house, Gross was permitted to go upstairs to dress, with some or all of the officers accompanying him. (Mot. Tr. 36-37, 45-46, 97, 99). Colquit testified that as Gross dressed, each item of Gross' clothing was searched for weapons, (Mot. Tr. 49), but Sgt. Wallace denied this (Mot. Tr. 99). Officer Colquit also testified that after entering the house, Gross was always in his presence (Mot. Tr. 45). Mrs. Leola Moon, who also resided at the C Street address, was taken down to headquarters also, but in a separate car from the one in which appellant rode. Mrs. Moon was supposed to be at work at 8:00 a.m. but did not leave headquarters until after noon (Mot. Tr. 13). The cars arrived at headquarters around 6:15 or 6:30 a.m., and Det. Sgt. Buch was immediately called at his home by Sgt. Wallace, and responded to headquarters

(Mot. Tr. 41, 102).[2]

Mrs. Moon did not see appellant when she first arrived at headquarters, but saw him later being taken somewhere with a policeman holding on to appellant's belt (Mot. Tr. 14). Mrs. Otho Pendergast, a cleaning lady, stated that she saw appellant between 5:30 and 6:30 or 6:45 a.m., "walking around the room by himself" (Mot. Tr. 188).

Gross was initially questioned in the back room of the Homicide Squad offices and denied any knowledge of the homicide (Mot. Tr. 159). At approximately 7:20 a.m., Det. Sgt. Crispin Preston, Sgt. Buch's partner, arrived (Mot. Tr. 133, 158). Sgt. Preston, who is one of four qualified polygraph (lie-detector) operators for the Police Department (Mot.

---

[2] General Order Number 5-H of the Metropolitan Police Dept. provides:

> Every effort should be made to effect arrest by the officers familiar with the case except when manifestly impractical to do so. This procedure is intended to avoid, insofar as possible, substantial periods of detention before interrogation can be accomplished by an officer familiar with the details of the case. Where circumstances prevent the officer familiar with the case to be present at the arrest, he shall be notified immediately in order to obtain his participation as soon as possible. (Mot. Tr. 208)

This order was in effect on January 5, 1966, and was known to Sgt. Wallace (Mot. Tr. 102).

Tr. 160), testified that he asked Gross to take a polygraph examination about the Mitchell murder and that Gross "absolutely said he refused to take it." (Mot. Tr. 133). However, Sgt. Preston persisted in his efforts, and after conferring with the Captain and obtaining some further information about Gross, and conferring with Gross at greater length, he finally obtained Gross' consent to the test. (Mot. Tr. 134-136). This took approximately one hour, and Preston entered the polygraph room with Gross at 8:20 a.m. (Mot. Tr. 163-164). It had been almost three hours since Gross had been "picked up" by Sgt. Wallace and his associates and would be still another hour before Preston administered the first polygraph examination at about 9:40 a.m. (Mot. Tr. 167).

Prior to taking Gross to the polygraph room, Preston told the latter he was free to go, and that he was "entitled to consult an attorney" and "could get a lawyer" (Mot. Tr. 134). Upon arriving in the polygraph room, Preston read a form to Gross[3] which states in part: "I have been informed of my constitutional rights and understand that I am not obliged to do or say anything that might incriminate me in

---

3 Appellant is illiterate (Tr. 171)

any manner and I have a right to secure the advice of an attorney . . . ." (Mot. Tr. 137-38). Appellant was given no other warnings.

The polygraph room at the Metropolitan Police Department, located on the third floor, consists of three individual examining rooms, each containing a polygraph machine and each about ten by twenty feet. Each room is reached from one common outer office. The door to the outer office is kept locked, and unauthorized personnel are not permitted to enter. Each polygraph room is soundproof, but one of the three has a concealed microphone which permits a person in the outer office to hear conversations in that polygraph room. This was not the room in which Gross was examined. Each room also has a "one-way glass" window which appears to be a mirror from inside of the room but permits a person outside the room to observe. According to Preston, medicinal-type bottles containing colored water are displayed as "camouflage for the two-way mirror". No one was asked to observe the interrogation of Gross. Each polygraph room contains a desk in which the polygraph recording device is located and a chair where the person being examined sits. There is a

single window in the room which is covered with a heavy drape and a single fluorescent lighting fixture in the ceiling. (Mot. Tr. 139, 160-63).

During Gross' polygraph examination, he was seated in the chair connected to the machine by means of a blood-pressure cuff attached to his left arm, a pneumatic tube fastened around his chest, and a "galvanic skin device" attached to the fingers of his right hand. Wires run from these items to the polygraph. (Mot. Tr. 147-48).

Gross and Preston were alone in the polygraph room for almost two hours, from 8:20 to 10:14 a.m. (Mot. Tr. 149, 163-64). Three polygraph tests were run, each test taking approximately three minutes. During this time Gross steadfastly denied any knowledge about the Mitchell case. At 10:20, Preston took the three graphs and went into the outer office, closing the door and leaving Gross alone in the polygraph room. Preston briefly examined the graphs and formed the opinion that Gross was lying. He then telephoned Sgt. Buch to come to the outer office, waited for Buch to arrive, and only then left to confer with Captain Donahue of the Homicide Squad. (Mot. Tr. 171-72.) There is no way out of the

polygraph room except through the outer office (Mot. Tr. 174).

Preston advised Donahue of the results of the tests and the two officers discussed "the technique to use in the interrogation of Mr. Gross". Preston admitted that the purpose of the interrogation which followed his conference with Donahue was "to obtain a confession from Mr. Gross". (Mot. Tr. 177-78) However, Preston did not tell Gross at this point that he was under arrest, nor did he give him any warning of his constitutional rights.

When Preston returned from conferring with Capt. Donahue, Gross wanted to use the bathroom, and Sgt. Buch accompanied him the short distance across the hall to the men's room. (Mot. Tr. 150, 179.) In response to questioning by the Court as to whether Gross was under arrest when Sgt. Buch took him to the bathroom, Sgt. Preston stated:

> "Your honor, I felt this was the subject responsible for her death. I would not have allowed him to go to the bathroom or anywhere else alone." (Mot. Tr. 183)

Upon Gross' return with Sgt. Buch from the bathroom, Gross and Preston entered the polygraph

room and went over the graphs together, with Sgt. Buch standing just outside the door, which was slightly ajar. Preston pointed out an extreme reaction by Gross to one of the important questions, as evidenced on the graph, and Preston told Gross that the latter had not answered the questions truthfully. Gross "became emotional," began crying and said, according to Preston, "I did it, I know I did it, I'll tell you about it, she owed me money." (Mot. Tr. 150, 153-54.) The time was 11:20 a.m., and Gross had been at police headquarters for more than five hours.

When Gross made the above statements, his first admission of any implication in the homicide, Preston testified he told appellant:

> "that he [Gross] knew that if he told me [Preston] about it, I would be able to testify to it in Court, did he understand that. He said he did. I didn't say anything else and the defendant went into a long statement of how he hurt her." (Mot. Tr. 154.)

The oral statement was completed about 11:30, and Gross was returned to the office of Captain Donahue where he repeated the statement in the presence of Mrs. Moon and Captain Donahue. He was then taken into

the backroom of the Homicide Squad office where Sgts. Buch and Preston prepared a typewritten statement which Gross signed. This typewritten statement was completed at 1:15 p.m. and contained a statement to Gross by Preston as follows:

> ". . . I advise you that your statement must be made freely and voluntarily; also, that you may have an attorney before making any statement; also, that your statement will be used in court at your trial if it becomes necessary."

(The entire statement may be found at Tr. 179-85).

Over an hour later, after booking and fingerprinting, Gross was taken to the United States Commissioner's office at approximately 2:20 p.m., and was advised of his rights. He requested that counsel be appointed to represent him, and his preliminary hearing was continued for that purpose.

On February 24, 1966, Harry Gross was indicted for the homicide of Mrs. Mitchell. The charges were first-degree (felony) murder, first-degree (premeditated and deliberate) murder, and robbery of $2.00 from Mrs. Mitchell's handbag.

A motion to suppress both the oral statement and the written confession was heard on January 13 and

20, 1967, before Judge Sirica. At the close of the evidence, Judge Sirica stated from the bench his view that the confession was admissible, and that there had been no violation of appellant's rights under the Fifth and Sixth Amendments, or under the Mallory Rule. Judge Sirica ruled:

> "He had been properly advised of his rights by the officers; he understood what his rights were; and he made a voluntary confession or admission." (Mot. Tr. 213).

Harry Gross, at the time of these occurrences, was over fifty years of age. On April 25, 1966, he was committed to St. Elizabeth's Hospital for a mental examination, on the motion of his counsel. The motion contained the allegations, which were not contradicted, that a physician had advised appellant's mother that a childhood fall had caused brain damage; that, according to appellant's mother, appellant had lapses of memory throughout childhood, and although appellant attended school until he was sixteen, he was unable to progress beyond the first grade. St. Elizabeths reported, in the standard form letter, that it found appellant to be without mental disease or defect. At the hearing on appellant's Motion to

Suppress, the defense proffered the testimony of Dr. Eugene C. Stammeyer of the staff of St. Elizabeths. This proffer was further clarified when the Motion to Suppress was renewed at the beginning of the trial, and was to the effect that appellant could not read nor write, could not identify letters of the alphabet, scored in the mental defective range on certain psychological tests, and had a mental age of approximately twelve years (S. Tr. 10, Mot. Tr. 64). In addition, appellant's scores on certain tests designed to indicate his ability to understand abstract concepts expressed in words were in the "subnormal range". (S. Tr. 10). This evidence was rejected by the Court as not material (Mot. Tr. 67).

Appellant's trial began, before Judge Sirica, on February 21, 1967. At the beginning of the trial, the Court permitted defense counsel to clarify the proffer regarding the testimony of Dr. Stammeyer, and permitted Government counsel, over objection, to read into the record the criminal record of appellant (S. Tr. 11-15). The Court raised the question of whether appellant's indigency had been demonstrated, relying on language in United States v. Knight, 261 F. Supp.

843 (E.D. Pa. 1966), but did not respond to defense counsel's offer to prove appellant's indigency, except to reiterate its view that the confession was properly obtained (S. Tr. 12, 16-17).

At the trial, the principal evidence offered against appellant was his written confession, received over objection, and read to the jury by government counsel.[4] (Tr. 179-85). In summary, the confession stated that the deceased, Mrs. Madge Mitchell, owed Gross some money for painting he had done for her previously, and that Gross wanted to be paid. On January 3, the day before the homicide, Gross went at about noon to the building next door to the Mitchell residence, and there spoke with Samuel Naylor, who was the janitor at the Mitchell house. Gross told Naylor that he wanted to see Mrs. Mitchell about the money owed him, and that he, Gross, would be back that evening. Naylor told Gross to knock on Naylor's door, and Naylor would let Gross into the Mitchell house.

That night, about 1:15 a.m. on January 4, Gross left his home and took a cab to the Mitchell residence. He went to Naylor's apartment in the

---

[4] Testimony concerning Gross' oral admissions was also received over objection (Tr. 144, 175).

basement of the building next door to the Mitchell residence, and Naylor and Gross then entered the Mitchell house with the aid of Naylor's key. Both men proceeded to the second floor of the Mitchell house, and Gross went into the bedroom. Noticing a light in the adjoining bathroom, Gross entered and found Mrs. Mitchell on the toilet. She screamed, Gross threw her on the bed and when she continued to scream, he "rolled a blanket and a sheet around her head" and "tucked it under her head. She stopped screaming then". (Tr. 182-83). (No blanket was found wrapped around the deceased's head (Tr. 162.).)

Gross then went through the dresser drawers in the bedroom, and took $2.50 from a purse found in the bathroom, which left over $500.00 still owing him, Gross claimed. He then ran out through the basement, leaving Naylor still standing on the second floor, looking out the window. Gross took a cab home and went to bed.

Most of the other evidence adduced at trial, both by the Government and by the defense, was contradictory of appellant's confession. Mr. Naylor testified that he hardly knew Gross (Tr. 210-11), did not

live next door to the Mitchell house (Tr. 200, 205-06), had been at work at the Treasury Department all day on January 3 (Tr. 205), and had been home with his wife and children during the night of January 3-4 (Tr. 209-10). Naylor, a Government witness, categorically denied letting Gross into the Mitchell house (Tr. 204, 212-13).

The Government called as witnesses all the employees who had keys to the Mitchell residence, but in each case their testimony was an outright denial that anyone would have had an opportunity to get or use their key to gain access to the house (Tr. 58, 63-66, 69, 76-79, 201-03). (The prosecutor nonetheless insisted to the jury that Gross entered with a key (Arg. Tr. 9-10, 34).).

As to Gross' claim that more than $500.00 was owed him by the deceased, the evidence was that Gross had painted only two rooms, and had not worked more than a week (Tr. 56-58, 70). Cancelled checks were introduced in evidence showing payment of $225.00 from Mrs. Mitchell to Gross (Tr. 383).

Witness Robert Limon, who operated a jewelry store next to the Mitchell residence, testified that he worked late on the night of January 3-4, and that

he heard footsteps in the Mitchell quarters about 3:00 a.m. (Tr. 81-82). On cross-examination, after Limon's statement to the police was produced under the Jencks Act, it further developed that Limon had accosted a Caucasian male, shortly before Christmas, at the door of the Mitchell residence about 2:00 a.m. under suspicious circumstances. (Tr. 94-95). Although a pre-trial discovery order signed by Judge Bryant on August 10, 1966 had commanded production to the defense of all material favorable to the accused, this information had not been disclosed, apparently because the prosecutor felt the information was irrelevant to the charges against appellant (Tr. 116, 121).

In light of Limon's testimony, an order was obtained during trial to have further laboratory tests made of brown hairs found in the bedclothing at the scene of the crime. These hairs had previously been identified as Caucasian in origin, thereby excluding appellant, who is Negro, as a possible source, but had not been compared with a sample from the deceased, who was white. Agent Robert Neill of the FBI testified that the Caucasian hairs in the deceased's bedclothing had not come from the deceased (Tr. 358-68).

No Negroid hairs were found. All the employees of the Mitchell household were Negro, with the exception of Mabelle McQuinn, who had white hair. (Cf. Arg. Tr. 22).

There was substantial conflict at the trial regarding the times involved, particularly as they affected the time of death of Mrs. Mitchell. The Coroner, Doctor Whelton, placed the time of death between 10:56 p.m. on the 3rd and 2:56 a.m. on the 4th (Tr. 8), but Dr. Mann, who performed the autopsy, testified that he found food particles in the deceased's stomach, which meant death occurred within three to six hours after eating (Tr. 34). The deceased had finished eating at 7:45 p.m. on the night of her death (Tr. 38).

Gross' confession indicated that he left his house for the Mitchell residence after receiving a telephone call at 1:15 a.m., but Mrs. Moon looked at the clock when the call came, and noted the time as 2:30 a.m. (Tr. 101-03). In addition, a witness in the building adjoining Mrs. Mitchell's bedroom testified that he heard a muffled scream around 11:40 p.m. (Tr. 391).

The evidence was uncontradicted that the window of Mrs. Mitchell's bedroom was wide open, and that a ventilator screen had been removed (Tr. 59-60, 82-83, 108, 129). The defense attempted to introduce photographs and testimony concerning the physical layout of the exterior of the Mitchell residence and the adjoining building, to show that access to the deceased's bedroom could have easily been gained by climbing up the front of the adjoining building and along a ledge that ran under Mrs. Mitchell's bedroom window. (These photographs are part of the record on appeal.) The court excluded this testimony as "speculative" and "not based on fact", after stating that defense counsel was trying to suggest that someone other than the defendant had committed the crime (Tr. 380). The court also excluded testimony aimed at showing that the ledge, which Sgt. Buch had testified was covered with dust which was undisturbed (Tr. 131), sloped away from the building towards the ground (Tr. 375-76), but permitted the defense to show that it had rained the night before the homicide (Tr. 398-99), although the court expressed concern that the evidence was being offered "to try to create some doubt in the jury's mind" (Tr. 386-87).

Defendant's proposed instructions, filed in the record in this case, were rejected by the trial court (Tr. 380). After the Government had elected to proceed only on the premeditated murder and robbery counts of the indictment (Tr. 340), the Court charged the jury, and on February 28, at 3:45 p.m., the jury retired to consider their verdict. They deliberated until 10:00 p.m. before being sequestered for the night, and after further deliberations on the following morning, returned their verdict finding appellant guilty of the lesser included offense of second-degree murder, and of robbery.

Appellant was sentenced on April 21, 1967, to serve 15 years to life on the homicide charge and 5 to 15 years on the robbery charge, the sentences to run consecutively.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V:

". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, ..."

22 D.C. Code §§ 2403:

"Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

22 D.C. Code §§ 2901:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Fed. R. Crim. P. 5(a):

"Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without

a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. . . ."

Fed. R. Crim. P. 44:

"Assignment of counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

STATEMENT OF POINTS

I The trial court erred in finding that when statements were obtained from appellant, he was not under arrest or in custody. With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Motion to Suppress, pp. 3-214; Additional Transcript of Proceedings (Monday, Feb. 20, 1967), pp. 9-17.

II The trial court erred in admitting into evidence statements made by appellant when he had not

been adequately advised of his Constitutional rights. With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Motion to Suppress, pp. 98, 133-39, 153-60, 164-65, 174-75, 178-83, 196-202, 212-14; Additional Transcript of Proceedings (Monday, Feb. 20, 1967), pp. 9-17.

III The trial court erred in admitting into evidence statements made by appellant during a period of unreasonable delay in presenting him to a committing magistrate. With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Motion to Suppress, pp. 3-214; Additional Transcript of Proceedings (Monday, Feb. 20, 1967), pp. 9-17.

IV The trial court erred in refusing to direct a judgment of acquittal because there was insufficient evidence of loss. With respect to Point IV, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Proceedings, pp. 179-85, 267-71, 274-75, 290 and 298.

V The trial court erred in failing to instruct the jury that the specific intent to steal was lacking if the taking was under a claim of right. With respect to Point V, appellant desires the Court to read Defendant's Proposed Instruction #1 and the following pages of the reporter's transcript: Transcript of Proceedings, pp. 144, 175, 183, 195, 272-74, 285-86, 283-90, 380; Transcript of Proceedings (Closing Arguments and Jury Charge) pp. 45-47.

SUMMARY OF ARGUMENT

I

Appellant was in custody or under arrest when he made incriminating statements admitted at his trial. The uncontradicted evidence shows that appellant's liberty was restrained, either when four armed police officers surrounded his house at 5:30 a.m., or, at the latest, at 10:20 a.m. at police headquarters, when a police officer (Sgt. Preston) would not leave appellant alone without calling another officer to guard appellant.

II

Appellant, with a mental age of twelve years, was not adequately advised of his Constitutional rights when he was not clearly informed of his right to remain silent and to have counsel appointed and present during the interrogation, nor of the fact that his statements would be used against him. Telling appellant that he could leave and could get a lawyer does not comply with the requirements of Miranda v. Arizona.

III

Appellant's statements were obtained during a period of unnecessary delay when his presentment to a committing magistrate was postponed for the admitted purpose of obtaining a confession. Naples v. United States, D.C Civ. #20312 (decided July 25, 1967).

IV

A confession must be corroborated by extrinsic evidence. Opper v. United States, 348 U.S 84 (1954); Smith v. United States, 348 U S 147 (1954); Naples v. United States, 120 U.S App. D C

123, 128-29, 344 F.2d 508, 513-14 (1954). The sole extrinsic evidence offered to corroborate appellant's statement in the confession that he took money was testimony that open drawers and an open empty purse were found. This evidence is insufficient to corroborate appellant's admission that he actually took money. Naples v. United States, supra.

V

A good faith belief, even though mistakenly held, that one has a claim to property negates the specific intent to steal essential to robbery. People v. Butler Cal. 2d , 421 P.2d 703 (1967). All the evidence relating to appellant's intent showed that the alleged taking of money by appellant was under a good faith belief that he was entitled to it as wages for work done. Therefore, the trial court's failure to instruct the jury upon the defense theory that the specific intent to steal was lacking if the taking was under a good faith claim of right constituted reversible error. Tatum v. United States, 88 U.S. App. D.C. 386, 391, 190 F.2d 612, 617 (1951); Levine v. United States, 104 U.S. App. D.C. 281, 282, 261 F.2d 747, 748 (1958).

Miranda makes clear that "general on-the-scene" questioning is not custodial interrogation. Nor must the police interrupt and warn a person who rushes into a police station and states that he wishes to confess to a crime. But it is equally clear from the opinion of the Chief Justice that custodial interrogation means less than a formal arrest.

Some of the facts here are not in dispute, and these establish that appellant was in custody for purposes of Miranda before any incriminating statements were made. First, the questioning was not "initiated" by the appellant. Second, appellant's house was surrounded by armed police officers at 5:30 a.m., and appellant was taken to police headquarters. Third, he was interrogated in the back room of the Homicide Squad offices, and refused to take a polygraph test, but the questioning did not cease. Fourth, from 8:20 a.m. to 10:20 a.m., appellant was in a locked, soundproof polygraph room, and connected during part of that time to the polygraph machine. Finally, and most important, when the tests were completed and Sgt. Preston decided Gross was lying,

123, 128-29, 344 F.2d 508, 513-14 (1954). The sole extrinsic evidence offered to corroborate appellant's statement in the confession that he took money was testimony that open drawers and an open empty purse were found. This evidence is insufficient to corroborate appellant's admission that he actually took money. Naples v. United States, supra.

V

A good faith belief, even though mistakenly held, that one has a claim to property negates the specific intent to steal essential to robbery. People v. Butler Cal. 2d , 421 P.2d 703 (1967). All the evidence relating to appellant's intent showed that the alleged taking of money by appellant was under a good faith belief that he was entitled to it as wages for work done. Therefore, the trial court's failure to instruct the jury upon the defense theory that the specific intent to steal was lacking if the taking was under a good faith claim of right constituted reversible error. Tatum v. United States, 88 U.S. App. D.C. 386, 391, 190 F.2d 612, 617 (1951); Levine v. United States, 104 U.S. App. D.C. 281, 282, 261 F.2d 747, 748 (1958).

ARGUMENT

I. STATEMENTS WERE OBTAINED FROM APPELLANT DURING A PERIOD OF "CUSTODIAL INTERROGATION"

Appellant contends that the statements taken from him by the police after five hours' questioning at police headquarters were obtained during a period of "custodial interrogation," at the outset of which appellant should have been warned of his constitutional rights. Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, "custodial interrogation" was defined (384 U.S. at 444) as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," and the Court adds that this is what was meant in Escobedo v. Illinois, 378 U.S. 478 (1964) by the references to "an investigation which had focused on an accused." Miranda v. Arizona, supra, 384 U.S. at 444 n. 4.

To safeguard the Fifth Amendment's privilege against self-incrimination, Miranda requires clear and specific warnings at the outset of any questioning. In determining when "custodial interrogation" has begun, this purpose must be used as the touchstone of any test devised by the courts. The opinion in

Miranda makes clear that "general on-the-scene" questioning is not custodial interrogation. Nor must the police interrupt and warn a person who rushes into a police station and states that he wishes to confess to a crime. But it is equally clear from the opinion of the Chief Justice that custodial interrogation means less than a formal arrest.

Some of the facts here are not in dispute, and these establish that appellant was in custody for purposes of Miranda before any incriminating statements were made. First, the questioning was not "initiated" by the appellant. Second, appellant's house was surrounded by armed police officers at 5:30 a.m., and appellant was taken to police headquarters. Third, he was interrogated in the back room of the Homicide Squad offices, and refused to take a polygraph test, but the questioning did not cease. Fourth, from 8:20 a.m. to 10:20 a.m., appellant was in a locked, soundproof polygraph room, and connected during part of that time to the polygraph machine. Finally, and most important, when the tests were completed and Sgt. Preston decided Gross was lying,

Preston stated that he would not let Gross go anywhere alone, and in fact Gross was accompanied the few feet from the polygraph room to the bathroom across the hall by Sgt. Buch.

Appellant does not mean to intimate that this Court can or should close its eyes to the other evidence in the record demonstrating that Gross was under arrest long before any incriminating statements were made. The standard applied to determine the voluntariness of a confession -- "a standard grounded in the policies of the privilege against self-incrimination," Davis v. North Carolina, 384 U S. 737, 740 (1966) -- has long been tested by the Supreme Court by an "independent examination of the entire record, and an "independent determination of the ultimate issue . . . ." Davis v. North Carolina, supra at 742; cf. Brookhart v Janis, 384 U.S. 1, 5 n. 4 (1966). The same scope of review seems appropriate here, where the same privilege is at stake. Accordingly, appellant respectfully directs this Court's attention to the testimony of Officer Colquit, that the police went to 1810 C St. N.E. to arrest appellant and that appellant's clothing was searched before he was allowed

to get dressed, and to the testimony of Mrs. Moon that Gross was taken past her at Headquarters with a policeman holding him by the belt.

Here, as in Miranda, the "potentiality for compulsion is forcefully apparent . . . ." Miranda, supra at 457. Harry Gross, though over fifty years of age, cannot read nor write. He has a mental age of approximately twelve years, and could not progress beyond the second grade in school. St. Elizabeth's Hospital found that on some psychological tests appellant scored in the Mental Defective range. If custodial interrogation "trades on the weakness of individuals," Miranda, supra at 455, the police had a perfect target in Harry Gross. They were not dealing with an Irvin Scarbeck, nor even a Maceo Hutcheson. Cf. Scarbeck v. United States, 115 U.S. App. D.C. 135, 317 F.2d 546 (1962), cert. denied, 374 U.S. 856 (1963); Hutcherson v. United States, 122 U.S. App. D. C. 51, 351 F.2d 748 (1965).

Gross was nonetheless "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion," and for several hours while he denied his guilt "was questioned by police officers. . . in a

room in which he was cut off from the outside world." Miranda, supra at 461, 457.

The secrecy of station-house interrogation is one of its basic vices, and has recently led the Supreme Court to strike down lineup proceedings conducted in the absence of counsel. United States v. Wade, 35 U.S.L. WEEK 4597 (U.S. June 12, 1967). In the instant case, however, whatever gaps may exist in our knowledge of exactly what happened to appellant between 5:30 a.m. and 11:20 a.m. may be filled in part by the inferences deductible from Sgt. Wallace's disingenuous explanation of the phrase "turn a house up," and from the utterly incredible theory that four armed police officers, two at the front door and two at the back, are needed to convey an "invitation" to a person to come to police headquarters. Cf. United States v. Harrison, 265 F. Supp. 660, 661 (S.D.N Y. 1967), where the police went to the defendant's home and "suggested that he accompany them to the station house for questioning"; and People v. Allen, 272 N.Y.S.2d 249, 50 Misc. 2d 897 (Sup. Ct. 1966).

Indeed, even under the pre-Miranda standards of this Court, it is submitted that appellant was

actually under arrest, if not at his home then no later than 10:20 a.m. at police headquarters. Smith v. United States, 122 U.S. App. D.C. 300, 302 n.1, 353 F.2d 838, 840 n.1 (1965); Jackson v. United States, 118 U.S. App. D C. 341, 336 F.2d 579 (1964); Seals v. United States, 117 U.S App. D C. 79, 325 F.2d 1006 (1963), cert. denied, 376 U S 964 (1964); Kelley v. United States, 111 U.S. App. D.C 396, 298 F.2d 310 (1961).

II. APPELLANT WAS NOT ADEQUATELY ADVISED OF HIS CONSTITUTIONAL RIGHTS

Miranda v. Arizona, 384 U.S. 436 (1966), requires that the prosecution demonstrate, as a sine qua non to the use of any confession obtained during custodial interrogation, that the accused "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479. These warnings must be given in "clear and unequivocal

terms," 364 U.S. at 468, and "any reasonable doubts on this score must be resolved in favor of the defendant," United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966). "The presumption is that the defendant who has not been completely informed of his rights is ignorant of them." United States v. Miller, 261 F.Supp. 442, 446 (D. Del. 1966).

It is interesting to note, both before and after Miranda, the strict standards that have been applied in evaluating the advice given in open court by a judge to a defendant who wished to waive the right to counsel, under Fed. R. Crim. P. 44 or an equivalent state rule See, e.g., Townes v. United States, 371 F.2d 930 (4th Cir. 1966); Knight v. Balkcom, 363 F.2d 221 (5th Cir. 1966); Reed v. United States, 354 F.2d 227 (5th Cir. 1965). If the law demands such precision and clarity in the dignified atmosphere of the courtroom, where all may see, certainly less should not be tolerated in the "inherently coercive" and almost invariably secret atmosphere of the police station.

Appellant here never received any advice that he had a right to have counsel appointed to assist him, and to have counsel present during any

interrogation. He was instead told that he could "get a lawyer," and signed a form (which he could not read) telling him that he had the right "to secure the advice of an attorney" (Mot. Tr. 138). Both statements could only have suggested to the indigent appellant that if he had the money he could go out and hire an attorney. Indeed, Gross' request for appointed counsel immediately upon his presentation before the United States Commissioner belies any claim that Gross did not want the assistance of counsel. Cf. United States v. Miller, supra at 447, where the Court recognized that "defendant's conduct before the United States Commissioner where defendant requested that counsel be appointed strongly suggests that had he been aware of the availability of free counsel he would have demanded such assistance."

Nor was appellant adequately advised that he did not have to make any statement and could exercise his privilege to remain silent. On the contrary, Sgt. Preston's dogged persistence in obtaining Gross' consent to the polygraph examination could only have meant to Gross that he had no right to refuse to speak.

Finally, even when the written confession was taken from Gross, as well as when Preston warned Gross after the latter's statement in the polygraph room, appellant was never adequately told that his statements would be used against him. Accordingly, the statements obtained from appellant were taken in violation of his Constitutional rights, and requires a reversal of the judgment against him.

III. STATEMENTS WERE OBTAINED FROM APPELLANT IN VIOLATION OF RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

As indicated above, there can be no question that appellant was under arrest, even though he had not been told that he was, at approximately 10:20 a.m., when Sgt. Preston would not leave Gross unguarded in the polygraph room, but called Sgt. Buch to come to that room so that Preston could leave and confer with Capt. Donahue. Gross had continually denied his guilt for about four hours at this point, and Preston felt he needed some advice on the "technique to use in the interrogation of Gross." After getting this from his superior, Preston went back to the polygraph room "to obtain a confession."

In Naples v. United States, D.C. Cir. #20312, decided July 25, 1967 (slip opinion p. 6) this Court said:

> "It is surely beyond question that Mallory, in 1958 and continuously ever since, is concerned with the concept of purpose entertained by the policeman interrogating after arrest and before presentment."

The decisions of this Court make it clear that these statements were obtained in violation of Rule 5(a), and are therefore inadmissible. Naples v. United States, supra; Alston v. United States, 121 U.S. App. D.C. 66, 348 F.2d 72 (1965); Greenwell v. United States, 119 U.S. App. D C. 43, 336 F.2d 962 (1964), cert. denied sub nom. Greenwell v. Anderson, 380 U.S. 923 (1965); Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283 (1964); Ricks v. United States, 118 U.S. App. D.C. 216, 334 F.2d 964 (1964); Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), cert. denied, 376 U.S. 964 (1964).

IV. THE LOWER COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF ROBBERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF TAKING.

The third count of the indictment, the robbery count, charged that appellant took "$2.00 in money".

The sole evidence of such taking or loss, an essential element of the crime of robbery, was:

1. Appellant's statement in the confession that he "took a couple of dollars" out of a purse in the bathroom;* and (Tr. 183).
2. The testimony of Sgt. Buch that he found drawers pulled open in Mrs. Mitchell's bedroom and an open empty purse in her bathroom. (Tr. 129.)

This evidence is insufficient to prove beyond a reasonable doubt the essential fact that appellant actually took money. A confession must be corroborated by extrinsic evidence. Opper v. United States, 348 U.S. 84 (1954); Smith v. United States, 348 U.S. 147

---

* The confession also contains the following statement:
"Q. What did you take from Mrs. Mitchell?
A. Two dollars and fifty cents, that left her owing me five hundred and some dollars. She owed me this for painting I had done there." (Tr. 184)

(1954); Naples v. United States, 120 App. D.C. 123, 344 F. 2d 508 (1954); cf. Wong Sun v. United States, 371 U.S. 471 (1963). The only extrinsic evidence offered to corroborate appellant's statement in the confession that he took money was Sgt. Buch's testimony regarding the open drawers and purse and this evidence is insufficient. Naples v. United States, 120 App. D. C. 123, 128-29, 344 F. 2d 508, 513-14.

In the Naples case, the lower court dismissed a petty larceny count for lack of corroboration of the defendant's admission that he took money. Similar to the instant case, the extrinsic evidence in Naples included open closets, drawers and an empty wallet. This Court said that while such evidence was sufficient to corroborate Naples' admission of an intent to steal, "It might not be sufficient to corroborate appellant's admission that he actually found money in the apartment" and noted the lower court's dismissal of the petty larceny count on that ground. In Wong Sun v. United States, 371 U.S. 471, at 489-90 n. 15 (1963), Mr. Justice Brennan noted that:

> "Where the crime involved physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable."

In the present case there was no evidence of the fact of actual taking or loss and criminal culpability independent of appellant's confession.

At the close of the Government's case trial counsel for appellant moved to strike the confession and for a judgment of acquittal on the robbery count because of insufficient corroboration of appellant's confession that he took money. Counsel called the Trial Court' attention to the Naples case and the lower court decision therein. Judge Sirica denied appellant's motion (Tr. 267-271, 274-275, 290, 298). Appellant submits that denial of this motion was error.

V. THE LOWER COURT'S REFUSAL TO INSTRUCT THE JURY THAT THE SPECIFIC INTENT TO STEAL REQUIRED FOR ROBBERY WAS LACKING IF THE TAKING WAS UNDER A CLAIM OF RIGHT CONSTITUTED REVERSIBLE ERROR

The commission of the crime of robbery under the District of Columbia robbery statute, as under the common law, requires the specific intent to steal. Jackson v. United States, 121 U.S. App. D. C. 160, 348 F.2d 772 (1965); Byrd v. United States, 119 U.S App. D. C. 360, 342 F.2d 939 (1965).

The sole evidence relating to appellant's

intention was appellant's statements in the oral and written confessions that he had taken the money because he believed the deceased owed him the money for painting he had done. (Tr. 144, 175, 183, 195). This evidence that the taking was under a good faith belief by appellant that he was entitled to the money as wages for his painting work was undisputed.

It is well established in this country that a good faith belief, even though mistakenly held, that one has a claim or right to property negates the specific intent to steal, an essential element of the crime of robbery. People v. Butler, ___Cal. 2d_____ 421 P.2d 703 (1967) (en banc, per Traynor, C.J.); People v. Gallegos, 130 Colo. 322, 274 P.2d 608 (1954). See also Annot., 46 A.L.R 2d 1227 (1955).

In People v. Butler, Chief Justice Traynor, speaking for the majority of the California Supreme Court said:

> "The taking of property is not theft in the absence of an intent to steal, and a specific intent to steal, i.e., an intent to deprive an owner permanently of his property, is an essential element of robbery. . . . (P)roof of the existence of a state of mind incompatible with an intention to steal precludes a finding of either theft or robbery. It has long been the rule of this state and generally

> throughout the country that a bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent ....Felonious intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it." ___Cal. 2d at ___, 421 P.2d at ___(1967).

While this Court has not specifically passed on this claim of right principle in the context of a robbery case, it has been recognized as a valid defense in other criminal cases where an analogous good faith claim of right was asserted to negate the requisite criminal intent of the crimes charged. Evans v. United States, 98 U.S. App. D.C. 122, 232 F. 2d 379 (1956) (Grand larceny and unauthorized use of a vehicle); Mills v. United States, 97 U.S. App. D. C. 131, 228 F. 2d 645 (1955) (Larceny and housebreaking); Fulton v. United States, 45 App. D. C. (D. C. Cir. 1916) (embezzlement); Staples v. United States, 25 App. D. C. 155 (D. C. Cir. 1905).

It was thus the defense theory at the trial, that the alleged taking of money by appellant was under a good faith belief that he was entitled to it as wages for his painting work and that the specific intent requisite for robbery was therefore lacking.

Appellant's trial counsel clearly articulated, and specifically urged this important defense theory at the close of the Government's case and in support of appellant's motion for a judgment of acquittal on the robbery count. (Tr. 272 - 74, 285- 86, 288 - 90). Judge Sirica denied appellant's motion. (Tr. 298). Appellant's trial counsel also specifically requested, in "Defendant's Proposed Instruction #1," that the Trial Court instruct the jury regarding appellant's theory of defense that the requisite specific intent to steal was lacking because of appellant's claim of right to the money as wages for painting work. The Trial Court refused to give the requested instruction stating (Tr. 380):

> "Defendant instruction No. 1, No. 2, No. 3 will be denied because I am going to cover them in substance in my general instructions without referring to any of the so-called evidence in the case because I don't comment on evidence."

The Trial Court's instruction to the jury on count three of the indictment, the robbery count, spans pages 45 - 47 of the transcript of the proceedings of "Closing Arguments and Jury Charge". The sole comment by the Trial Court regarding the essential robbery element of specific intent was as follows (Arg. Tr. 47):

> "and that such taking was with the specific intent to steal, that is, to permanently deprive the owner of her property..."

Appellant submits that the Trial Court erred by both refusing and failing to instruct the jury on the defense theory that the specific intent to steal requisite for robbery was lacking because the charged taking was under a good faith claim of right.

It is well established that in "criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any evidence", Tatum v. United States, 88 U. S. App. D. C. 386, 391, 190 F. 2d 612, 617 (1951), and it is reversible error for the court to refuse on request to so instruct. Levine v. United States, 104 U. S. App. D. C. 281, 282, 261 F. 2d 747, 748 (1958). See also Collazo v. United States, 90 U. S. App. D. C. 241, 246, 196 F. 2d 573, 578, cert. denied, 343 U. S. 968 (1958); Rivera v. United States, ___U.S. App. D. C. ___, 361 F. 2d 553, 555 (dissenting opinion), cert. denied, 385 U. S. 938 (1967).

Appellant submits that the refusal to give the requested instruction removed from the jury's consideration the clearly material issue of whether the taking charged was under a bona fide claim of right

and thus did not constitute the crime of robbery because the specific intent to steal was absent. Thus, the jury was permitted to believe that in any event -- whether the taking was under a claim of right according to the confessions or otherwise, that appellant would be guilty of robbery. Appellant has a constitutional right to have every significant issue determined by the jury and the Trial Court's refusal to instruct the jury on an important defense theory of the case deprived him of this right.

CONCLUSION

For the reasons stated above, counsel for appellant respectfully submit that the judgment below should be reversed.

If we are correct in our contentions on Points I and II, this Court should remand the case to the Trial Court for a new trial at which evidence of appellant's statements would be excluded. The same disposition would be proper if we are correct in our contentions on Points I and III.

If we are correct in our contentions on Point IV, this Court should remand the case for entry of a judgment of acquittal on the robbery count.

If we are correct in our contentions on Point V only, this Court should remand the case to the Trial Court for a new trial.

Respectfully submitted,

Edgar H. Martin
730 Fifteenth Street, N. W.
Washington, D. C. 20005

J. Patrick Hickey
910 Seventeenth Street, N. W.
Washington, D. C.

Counsel for Appellant

(Both appointed by this Court)

August 7, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,994

HARRY GROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
Assistant United States Attorneys.

RICHARD L. BRAUN,
PAUL C. SUMMITT,
Attorneys,
United States Department of Justice,
Washington, D.C., 20530.

QUESTIONS PRESENTED

1. Whether statements were obtained from appellant during a period of "custodial interrogation" without adequate advice of his constitutional rights.

2. Whether statements were obtained from appellant during a period of unnecessary delay in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

3. Whether the robbery charge was supported by sufficient evidence.

4. Whether the trial court adequately instructed the jury on the specific intent to steal required for conviction of robbery.

INDEX

TABLE OF CASES

Cases—Continued

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,994

HARRY GROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 24, 1966, appellant was indicted by a grand jury of the United States District Court for the District of Columbia in three counts charging felony murder, premeditated murder and robbery, in violation of 22 D. C. Code 2401, 2901. On March 1, 1967, appellant was convicted by a jury in the United States District Court for the District of Columbia of the lesser included offense of murder in the second degree (22 D.C. Code 2403) and robbery.[1] He was sentenced on April 21, 1967

[1] The government elected to submit only the premeditated murder and robbery counts to the jury (T. Tr. 340). T. Tr. refers to the transcript at trial. Mot. Tr. will be used to designate the transcript of the hearing on the pre-trial motion to suppress evidence.

to imprisonment for a period of fifteen years to life on the murder count and five to fifteen years on the robbery count, to run consecutively.

1. The evidence at trial showed that Mrs. Madge Mitchell, a 65 year-old widow, was, about 9:30 a.m. on January 4, 1966, found by her housekeeper who lived on the premises strangled to death in her bed (T. Tr. 31, 43, 55-56). Death had been caused through suffocation induced by a sheet tightly wrapped around the deceased' head (T. Tr. 6-20, 28-31, 106, 128, 137-140). Medical evidence indicated that death could have occurred anytime between 10:56 p.m. and 3:00 a.m. of the preceding night (T. Tr. 8, 33-36, 38). The housekeeper had retired to her room one floor above that of the deceased' bedroom the previous evening about 8:00 p.m. after locking the doors. She was not disturbed or given cause for suspicion that something was wrong until discovering the body the following morning (T. Tr. 41-42, 44-45, 48-55). Mr. Limon, a jeweler working late in his shop adjacent to the home of the deceased, thought he heard footsteps in the bathroom of the deceased about 3:00 a.m. Upon leaving to go home some twenty minutes later, he noticed the unusual fact that one of three windows in the deceased' bedroom was full open and the light was on (T. Tr. 81-85, 91-92).

On January 5, 1966, appellant made an oral statement to the police to the effect that he had gone to the home of the deceased to get money she owed him, that he did not intend to hurt her, that he found her in the bathroom, that she started to scream when she saw him and that he wrapped her head with a sheet and struck her several times (T. Tr. 142-144, 173-176, 194-195). Shortly thereafter a written statement was taken (T. Tr. 179-184; Gov't exh. 6) in which appellant said that he had known the deceased about a month and a half. On the morning prior to the homicide, he went to see the janitor of the deceased (Naylor) who lived next door to her. He told the janitor about money the deceased owed him and that he would be back that night. The janitor told appellant he would let him in the house. That night, after

he got a telephone call around 1:15 a.m., appellant took a cab to the home of the deceased, went to the janitor's apartment in the basement of the building next door and both men entered the house using the janitor's key. Upon proceeding to the second floor, appellant went into the deceased's bedroom. He noticed a light on in the bathroom and accosted the deceased on the toilet. She screamed. Appellant then threw her on the bed and, when she continued to scream, rolled a blanket and sheet around her head. She stopped screaming. Appellent then went through some drawers and took a couple of dollars out of a purse in the bathroom. Appellant departed the premises through the basement door, leaving the janitor standing on the second floor. He took a taxi home and went to bed without waking up his girl friend.[2]

2. The major issue in the case is the admissibility of appellant's statements.

It was brought out at trial that, upon discovery of the body by the housekeeper, the police were promptly notified (T. Tr. 58, 105). The police found human feces in the commode in the adjacent bathroom and on the lower extremities of the deceased. There was an open purse in the bathroom with no money in it and the dressers had been rifled and searched. The center window in the bedroom was full open. All other doors and windows had been securely locked from the inside. There was no evidence of forced entry at any of the doors and windows. The open window and surrounding area showed that no entry had been made through the open second floor window (T. Tr. 126-132, 137-142, 162). Examination of the premises for latent fingerprints revealed only prints of

---

[2] The janitor, Samuel Naylor, denied any involvement in the incident. He stated that he had seen appellant only a few times when appellant was working around the house of the deceased; that he took care of a building close by the deceased's home that belonged to the deceased but did not live there; that he had worked at the Treasury Department all day the day before the homicide; that he had been home with his family the night of the homicide and that he did not let appellant into the home of the deceased (Tr. 200-213, 259).

the deceased (T. Tr. 222-223, 225-228, 238-239) and prints left by leather gloves in areas that had obviously been disturbed and left in disarray (T. Tr. 223-228, 239). Human hairs found in the vicinity of the body were identified as having the characteristics of the Caucasion race [3] and (contrary to the statement in appellant's brief, p. 19) a number of them possessed the same characteristics as the head hairs of the deceased (T. Tr. 355-365, 368). Keys to the premises were in the possession of employees of the deceased, including the housekeeper (Mabelle McQuinn), the cook (Margie Carter), the handyman (Samuel Naylor) and the maid (Mary Gross, appellant's mother) (T. Tr. 58, 63-66, 69-70, 76-77, 201-203). The month prior to the murder, appellant had worked for the deceased several days painting rooms (T. Tr. 56-58, 66-67, 70-71, 75, 211, 382-383).

At the pre-trial hearing on the admissibility of the confession it was shown that some of the persons who had keys were interviewed at the scene (Mot. Tr. 7-8, 75-76, 80, 88, 91). In the late afternoon of January 4, 1966, Sergeant Buch tried to locate appellant at the residence of his mother, also reportedly appellant's address, but he was not living there. Appellant's mother was informed that the police would like to talk to him (Mot. Tr. 76). Buch was told that appelant lived at 1810 C Street and proceeded to that address about 7:00 p.m. He talked to appellant's girl friend, Leola Moon, who told him that appellant was out and that she did not know when he would return (Mot. Tr. 5-8, 15-17, 77, 82). She was informed that the police wanted to speak to appellant since he had contact with the house at Mrs. Mitchell's and "we were talking to all employees and ex-employees who had access to the house and knew the premises" (Mot. Tr. 27, 77, 82-83). Leola Moon told appellant when he came home that night that the police had been to his mother's house and there to talk to him (Mot. Tr. 17-18, 27-28). Sergeant

[3] Except for Mabelle McQuinn, all of the employees of the deceased were Negro. Appellant also is Negro.

Buch had also been told at appellant's mother's house that it was believed appellant worked in Virginia in construction jobs (Mot. Tr. 77, 79-80, 87-88) which the Sergeant knew started around 7:00 a.m. (Mot. Tr. 77-78).

Around 10:00 p.m. on January 4, 1966, Buch met with Wallace and Thornton, detectives on the "midnight crew" reporting early to assist in the case (Mot. Tr. 83-84, 93). Buch explained the status of the case to them and asked them to contact appellant the next morning prior to his leaving for work in the continuing effort to "get statements from anybody that had anything to do with that household" (Mot. Tr. 78-79, 84-87, 94, 103-104, 124-125). Buch instructed them to call him at home if they found appellant at home and he would come in for a statement (Mot. Tr. 88-90).

About 5:30 a.m. on January 5, detectives Wallace and Thornton rendezvoused with a two-man scout car at appellant's residence and advised the two uniformed officers that they were to assist in picking up a witness in reference to the homicide case (Mot. Tr. 31-34, 39-44, 95-96, 104, 199).[4] Thornton and one officer went to the rear entrance. Wallace and the other officer went to the front door. Wallace knocked two or three times and appellant answered the door (Mot. Tr. 8-9, 19, 33-35, 96, 119-120). Wallace identified himself and told appellant that he wanted to get a statement from him concerning the deceased, to find out if he had a duplicate key and to obtain fingerprints for elimination purposes (Mot. Tr. 96, 98, 119-120, 126).[5] Appellant said "all right". After letting the officers in at the rear door, he went upstairs to get dressed (Mot. Tr. 96-97). Detective Wallace testified

---

[4] Uniformed officers were requested to assist because it was dark and there are inherent dangers in making contacts at a private residence at that hour in civilian clothes (Mot. Tr. 33, 104). One of the uniformed officers thought he remembered being informed that an arrest warrant was to be executed (Mot. Tr. 32-33, 43, 52-60).

[5] While the officers were at appellant's house, they did not inform appellant that he did not have to make a statement or did not have to accompany them to the station (Mot. Tr. 98).

that they were waiting in the living room for appellant to get dressed when he remembered that he had been instructed to have appellant's girl friend come down for a statement also. He then went upstairs, accompanied by one of the uniformed officers, and "told them I would like her to come along also" (Mot. Tr. 97, 104, 121). He went back downstairs and waited until they were ready to leave (Mot. Tr. 97).[6] At no time was appellant told that he was under arrest or searched (Mot. Tr. 98-100, 103, 131).

On the way to the station, appellant rode with the two homicide detectives and appellant's girl friend rode with the other officers (Mot. Tr. 38, 97, 121-123). Appellant rode unrestrained in the back seat of the cruiser and the two detectives rode in the front seat (Mot. Tr. 122, 129-130). Normal procedure for transporting a person arrested would have been to place him in the back seat on the opposite side from the driver with an officer sitting in the back seat with him (Mot. Tr. 131). Upon arrival at the station about 6:30 a.m., detective Buch was contacted at home by telephone (Mot. Tr. 89, 100, 102, 124, 193). Appellant was not questioned in any manner concerning the case and was given full run of the homicide spaces awaiting the arival of detective Buch (Mot. Tr. 100-103, 127, 188, 191, 194-195).

Buch arrived about 7:10 a.m. (Mot. Tr. 193). About 7:20 a.m., Buch and detective Preston, an officer trained in polygraph examinations (Mot. Tr. 140-141, 160), began an interview with appellant (Mot. Tr. 133, 158, 194-195). Preston introduced himself, engaged appellant in conversation about the case and explained to him that he was one of several persons who "we felt was suspect in this case" (Mot. Tr. 133). Preston's purpose in talking with appellant was to see if he would take a poly-

[6] Pvt. Colquit, one of the uniformed officers, testified that all four of the officers went upstairs with appellant when he went up to dress and that appellant's clothes were "patted down" to check for dangerous weapons (Mot. Tr. 36-37, 45-46, 49). Appellant's girl friend supported Detective Wallace's testimony (Mot. Tr. 9-10).

graph examination (Mot. Tr. 133). Appellant was told that he did not have to take an examination, that it was voluntary, that he could leave anytime he wanted and was not under arrest and that he could get a lawyer (Mot. Tr. 133-134, 180). He said he did not want a lawyer (Mot. Tr. 136). Appellant indicated that he had had some experience with a polygraph and did not want to take an examination (Mot. Tr. 133, 136). After thirty to forty minutes of conversation, appellant wanted to know what questions would be asked if he agreed. Preston explained that the questions would pertain primarily to the instant case. Appellant said that "he had no fear of that, that he was telling the truth" (Mot. Tr. 134, 158-160). After he was told the questions to be asked, some eleven in number, appellant agreed to an examination (Mot. Tr. 134-137). During the course of the conversation terminating in an agreement to take a polygraph test on certain questions, appellant was orally informed concerning his rights as previously indicated at least four times (Mot. Tr. 134, 137, 180-181; T. Tr. 142-144, 173-174).

After agreement to the examination about 8:20 a.m., Preston went over a standard warning form [7] with appellant who initialed it (Mot. Tr. 135, 137-138, 164). The procedure and method of examination was explained to appellant and Preston went over the simple "yes-no" questions with him at least two times prior to the examination (Mot. Tr. 139-148, 164-167).[8] Three two-minute polygraph charts were run on appellant with an appropriate rest period between each, using the predetermined eleven questions. They were completed at 9:40 a.m.,

---

[7] The form contained the following (Mot. Tr. 137-138):

> I have been informed of my Constitutional rights and under [sic] that I am not obliged to do or say anything that might incriminate me in any manner and I have a right to secure the advice of an attorney. With full knowledge of those rights I hereby submit to a lie detector test in regard of the following * * *

[8] The questions are reproduced in the record at Mot. Tr. 143-144.

9:59 a.m. and 10:14 a.m., respectively (Mot. Tr. 148-149, 167, 170). Preston took the charts into the outer office, examined them and concluded that appellant had lied on the critical questions (Mot. Tr. 150, 170-172, 206-207). He reviewed the charts with the commanding officer of the Homicide Squad, indicating to his superior that in his opinion appellant had lied (Mot. Tr. 172). They discussed the interrogation technique to be used in order to obtain a confession (Mot. Tr. 177-178). Preston returned to appellant waiting in the polygraph room and appellant was permitted to go to the bathroom accompanied by Sergeant Buch (Mot. Tr. 150, 173). Preston indicated that at the time appellant was accompanied to the bathroom by Buch, he felt that appellant was responsible for the death and he would not have allowed appellant to go to the bathroom or anywhere else alone (Mot. Tr. 182-183). Appellant was not, however, formally placed under arrest since there was not sufficient evidence (Mot. Tr. 181-183, 185). When appellant returned to the polygraph room about 11:20 a.m., Preston informed him that it was his opinion that he had lied. Appellant denied this and questioned the accuracy of the machine (Mot. Tr. 150, 174, 196). Appellant examined one of the charts with Sergeant Preston, noting particular responses and correlating the questions (Mot. Tr. 150-153, 175-176, 200-202, 207). Preston showed appellant the tenth question and pointed out how big the reaction was. Appellant looked at the chart and said the response to question number five was even bigger (Mot. Tr. 153). When it became apparent to appellant that there were marked responses to questions related to the homicide, he became quite emotional and told Preston, "I did it, I know I did it, I'll tell you about it" and "she owed me money" (Mot. Tr. 153-155, 178-179, 197-202, 204, 207; T. Tr. 144, 175, 195). Preston immediately told him "that if he told me about it I would be able to testify to it in court" (Mot. Tr. 154; T. Tr. 144, 175). Appellant said he understood. Preston then told him he was under arrest (Mot. Tr. 154-155, 182, 196-197, 200, 202).

Appellant then gave a detailed oral statement which took approximately ten minutes (Mot. Tr. 154). He repeated the oral account of the crime in the homicide captain's office in the presence of his girl friend (Mot. Tr. 155-156) following which Sargeants Buch and Preston went to the back office of the homicide squad with appellant and took a written statement (Mot. Tr. 156, 179; T. Tr. 144-145, 147-150, 176-185, 195-197). Prior to taking the written statement, appellant was advised in writing that the "statement must be made freely and voluntarily; also you can have an attorney. Also, the statement will be used in Court in trial if it becomes necessary * * *." (Mot. Tr. 157; T. Tr. 180). The written statement was started about 12:15 p.m. and completed about 1:15 p.m. (Mot. Tr. 156-157). After appellant was confronted with the janitor implicated by his statement around 1:15 to 1:30 p.m. (T. Tr. 247-249, 251), he was taken to the identification bureau for photographing and fingerprinting. Appellant was presented before the United States Commissioner about 2:00 p.m. (T. Tr. 252).

The court concluded from the evidence at the hearing that appellant was not arrested until after he made his initial admission, that the polygraph tests were made voluntarily when appellant was not under restraint and after he had been properly advised of his constitutional rights, that there was no unnecessary delay in taking appellant before a commissioner and that the statements made by appellant were voluntarily made with full understanding of what his rights were (Mot. Tr. 211-214).

SUMMARY OF ARGUMENT

I

Appellant's statements concerning the offense were not obtained as a result of in-custody interrogation without proper warning. The warnings given at the beginning of the interview and at various times thereafter were sufficient to insure that appellant was aware of his rights and

voluntarily engaged in seeming cooperation with the police. Moreover, *Miranda* would not suppress voluntary statements, even in the absence of precise warnings, which were not the result of in-custody interrogation. The statements taken here cannot realistically be attributed to in-custody interrogation.

II

Appellant's statements were not obtained during a period of unnecessary delay in presenting him to a committing magistrate. In the context of investigation of an unwitnessed unsolved crime involving voluntary interviews with suspect classes of persons, the decisions of this Court remain flexible enough for police to accept statements made by a suspect shortly after arrest which flow directly from the pre-custody situation. The oral and written statements taken promptly following arrest and resulting from the voluntary pre-custody polygraph examination were therefore not obtained during a period of unnecessary delay.

III

Appellant's claim that there was insufficient competent evidence that he took money from the purse of the deceased has no merit. Appellant's confession admitting as much was sufficiently corroborated to be considered by the jury in its totality. It is sufficient if substantial extrinsic evidence appears of record which tends to establish the trustworthiness of the confession. In any event, there was sufficient independent evidence tending to specifically corroborate appellant's statement that he took the money from the purse of the deceased.

IV

The court's instruction to the jury that it had to find, in order to convict on the robbery count, that appellant had the specific intent to steal, that is, an intent to permanently deprive the owner of her property, was ade-

quate instruction on this element of the offense. Moreover, the defense theory that appellant took the money under a good faith belief that he was entitled to it is not realistically presented by this record.

ARGUMENT

I

Appellant's Statements Were Not Obtained as a Result of In-Custody Interrogation Without Adequate Warning.

(See Mot. Tr. 3-214; T. Tr. 144-150, 173-185; Add. Tr. 9-17).

Appellant's oral and written statements concerning the crime were not, as he claims (App. Br. 29-36), obtained as a result of custodial interrogation before he had been adequately informed of his constitutional rights. The record shows that appellant was but one of several persons known to have had access to the homicide premises and that the interview eventually resulting in the statements was nothing more than a routine effort by the police officers to eliminate as suspects persons found to be in this group. The fact that a voluntary polygraph examination was used in no wise affects the situation. As Sergeant Preston indicated, the polygraph examination, for those willing to take it, is one method of elimination which saves the police time from fruitless investigation. It has often cleared persons circumstantially suspect (Mot. Tr. 140-141). No interrogation took place without warning.[9] Appellant was repeatedly informed orally and

[9] The questions asked in connection with the polygraph examination cannot be classified as "interrogation" as that term is normally understood. They are simple "yes-no" questions and the informational content of the answer is immaterial. Each question was expressly revealed to appellant several times before the examination took place, not to elicit incriminating answers, but because he insisted on having them as a condition for the examination and because the officer indicated that surprise during an examination can affect the reliability of the test. We assume that statements

in writing of his right to silence and to obtain an attorney. He stated he did not want an attorney. After appellant reacted to the results of the polygraph examination with the emotional outburst that "he did it," he was immediately placed under arrest and told that any further statements could be used in court. Prior to making the written statement, appellant was again advised in writing that the statement had to be "made freely and voluntarily" with the understanding that it could be used in court and that appellant was entitled to an attorney. We realize that the warnings given in this case do not precisely fit the linguistic mold of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) which, though handed down some six months after the instant statements were taken, is applicable because trial was delayed (*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)). Nevertheless, we believe that the warnings comport with the spirit of *Miranda* and were sufficient to insure that appellant, a man with over thirty years continuous criminal record of housebreaking and larceny (Suppl. Tr. 11-15), was well aware of his rights and voluntarily embarked on a course of seeming to cooperate with the police. Certainly he knew he did not have to submit to a polygraph test, as demonstrated by his initial refusal and subsequent agreement upon his own conditions.

Moreover, *Miranda* would not exclude even unwarned voluntary statements resulting from questions while the suspect was not "in custody." The record shows that appellant was not in custody from the viewpoint of the police at least until Sergeant Preston evaluated the results of the examination, determined appellant had lied and decided that he would not thereafter be allowed to go anywhere by himself. Appellant had no reason to believe he could not leave at any time without restraint until he spontaneously admitted the crime in response to the ex-

---

elicited after an involuntary polygraph test using the results of the test would be inadmissible as involuntary. However, appellant has consistently and expressly declined to object to the statements as involuntarily obtained (T. Tr. 135-136; Add. Tr. 18).

amination results and was formally placed under arrest. Thus, the initial admission resulted directly from study and correlation of pre-custody polygraph charts—not from "in-custody interrogation." Similarly, the detailed oral and written statements that followed, although during an in custody period after arrest, flowed directly from the pre-custody events and the initial admission.

There is a distinction between questioning a suspect after an arrest on independent evidence where police are attempting to "sew up a case" and police investigation of an unwitnessed crime by interviews without arrest of all persons who, while suspect in the sense that they had opportunity or knowledge helpful in committing the unwitnessed crime, are not in fact meaningfully connected with the crime. In the instant case the police had no idea who committed the homicide and logically turned to a general investigation of the relatives, employees, former employees and acquaintances of the deceased who might have had access to the premises. Appellant was questioned because he had recently painted at the deceased' home and his mother worked for the deceased as a maid.

Virtually all of the cases setting standards and criteria for the terms "in-custody," "interrogation" and "unnecessary delay" involve police conduct based on interrogation after the inquiry has at least focused on the accused even if he has not been formally arrested. The police in such cases have no doubt that they have the offender and this belief is readily communicated to the arrestee. Such was not the case here. This was a general investigation in which the police were seeking clues. Under these circumstances, most persons, including the real offender, will give voluntary cooperation to the police, either as a civic duty or to prevent the focus of suspicion. However, as contradictions appear or where, as here, a voluntary polygraph examination proves adverse, it does not further any significant public policy to insist that the suspicion created by the suspect himself with increasing momentum during a pre-custody period should suddenly be interrupted in mid-stream at some point guessed to be "prob-

able cause," to treat him as if he had just been arrested upon probably cause without any prior personal contact. On the contrary, the same strong public interest which permits pre-custody questioning, so long as voluntarily engaged, should dictate that the momentum of such questioning, lawful in its inception, should be permitted to bear its fruit in the normal course of things. The fact is that any confession under these circumstances realistically results from the pre-custody contact and the web of suspicion there developed by the suspect himself rather than "post-probable cause" or "in-custody" interrogation. Thus, even if it were found that the warnings under the circumstances did not measure up to *Miranda* standards for this case, we still think it clear that the statements admitted at trial against appellant in no way resulted from in-custody interrogation.

II

Appellant's Statements Were Not Obtained During a Period of Unnecessary Delay in Violation of Rule 5 (a) of the Federal Rules of Criminal Procedure.

(See Mot. Tr. 3-214; T. Tr. 144-150, 175-185, 195-197, 247-249, 251-252; Add. Tr. 9-17).

Appellant's further contention that the initial admission, the detailed oral confession and the written statement were all obtained during an unnecessary delay in presenting appellant to a United States Commissioner (App. Br. 37-38) is without merit. Rule 5(a) and the implementing decision of *Mallory* v. *United States*, 354 U.S. 449 (1957), are directed at preventing *unnecessary* delay in the interval after arrest and before presentment. Whatever may be the rationale for permitting little or no delay in the battery of cases cited by appellant which involve arrest on probable cause without a pre-arrest interview (App. Br. 38), the label of "unnecessary delay" in that type of case cannot be mechanically applied to completion of police interviews of a general group of pos-

sible suspects as a part of their investigation into an unsolved crime. Where the offender happens to be among the general group and the state of the evidence at the time of the interview does not point with any specificity to one person, as was the situation in the instant case, the focus of suspicion, if it occurs at all, slowly develops from elimination of members of the group as interviews are completed and as police evaluate the voluntary interview of the true offender as it progresses. The logical progression in the process may include, as here, a point perhaps short of probable cause that the police officer nevertheless has formed the opinion that he has the right man; a point of probable cause created by an admission by the suspect; a point of detailed oral description of the crime; and a point of reduction of the oral statement to writing. There is no sound reason to insist that arrest occurs at the time the police officer concludes, albeit on evidence short of probable cause, that he has found the guilty man unless the officer in some meaningful way indicates to the offender that he is now exercising custodial power and the suspect submits as a consequence.[10]

In this context, we think the record shows that appellant herein was not under arrest and had no reason to think he was until he admitted committing the offense and was told by Preston that he was under arrest. While it is true that Preston testified that he would not have allowed appellant to go anywhere alone after evaluation

---

[10] As we understand it, arrest occurs at that point in time when the action of the police officer reasonably causes the person arrested to understand that he is in the power of the one arresting, and submits in consequence. See, e.g., *Jackson* v. *United States*, 118 U.S. App. D.C. 341, 336 F.2d 579 (1964); *Seals* v. *United States*, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), certiorari denied, 376 U.S. 964 (1964); *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961); *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F.2d 555, certiorari denied, 369 U.S. 813 (1961). Arrest does not automatically occur when evidence amounting to probable cause is available to the police, even where it is a confession. See *United States* v. *Knight*, 261 F. Supp. 843 (E.D. Pa., 1966) and *Cunningham* v. *United States*, 119 U.S. App. D.C. 262, 340 F.2d 787 (1964).

of the polygraph charts, these facts were not communicated to appellant. Moreover, the record plainly shows that appellant's initial outburst resulted, not from a sense of being in custody, but from simple correlation of the polygraph charts with the questions and the realization that the machine had accurately recorded false responses. Such a confession, assuming voluntary participation in the polygraph examination, is not analogous to a confession obtained after arrest on probable cause during police instigated delays enroute to the magistrate. Likewise, the more detailed oral account, interrupted only by the announced arrest and warning concerning possible use of the statement in court, was a mere continuation of the initial outburst and was not prompted by a police designed delay. The decisions of this Court retain the flexibility in appropriate circumstances, as here, for acceptance by police of statements of a suspect within the context of a developing case within a short time following actual arrest. See *Coor* v. *United States*, 119 U.S. App. D.C. 259, 240 F. 2d 784 (1964), certiorari denied, 382 U.S. 1013 (1966); *Bailey* v. *United States*, 117 U.S. App. D.C. 241, 328 F. 2d 542, certiorari denied, 377 U.S. 972 (1964); *Muschette* v. *United States*, 116 U.S. App. D.C. 239, 322 F. 2d 989 (1963), vacated on other grounds, 378 U.S. 569 (1964); *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F. 2d 572 (1962); *Turbeville* v. *United States*, 112 U.S. App. D.C. 400, 303 F. 2d 411, 416-417, certiorari denied, 370 U.S. 946 (1962); *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943, 945-946, certiorari denied, 359 U.S. 959 (1958); *Porter* v. *United States*, 103 U.S. App. D.C. 385, 258 F. 2d 685 (1958), certiorari denied, 360 U.S. 906 (1959). Indeed, we believe this is precisely the type of case in which such flexibility should be applied.

Having thus lawfully obtained voluntary oral statements bottomed on a voluntary pre-arrest interview with the police, it was not unnecessary delay to get the oral statement into writing. See, e.g., *Bailey* v. *United States*, 117 U.S. App. D.C. 241, 328 F. 2d 542, 545-547, cer-

tiorari denied, 377 U.S. 972 (1964); *United States* v. *Vita*, 294 F. 2d 524 (2d Cir., 1961), certiorari denied, 369 U.S. 823 (1962); *Muschette* v. *United States*, 116 U.S. App. D.C. 239, 322 F. 2d 989, 991 (1963), vacated on other grounds, 378 U.S. 569 (1964); *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 64-65, 250 F. 2d 30, 32-33 (1957).[11] Assuming that the oral confession was properly obtained, the reduction of the substance of the oral confession to writing is to the interest of all concerned, including the defendant. Memories of both sides fade with time. Immediate reduction to writing is the best method of accurately preserving the true extent of oral admissions.

III

There was sufficient competent evidence that appellant took money from the purse of the deceased.

(See T. Tr. 6-20, 28-38, 106, 126-132, 137-142, 162, 179-184)

Appellant complains that the robbery count should have been dismissed because there is no evidence outside his confession that he took a couple of dollars from the deceased' purse (App. Br. 39-41). This contention is without merit. All elements of the offense do not have to be

---

[11] *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964), certiorari denied, 380 U.S. 923 (1965), is not to the contrary. There the oral confession was obtained after arrest on probable cause when F.B.I. agents stopped to question the defendant concerning the crime enroute to headquarters. Based on an oral confession thus obtained, there was a detour to search the home of the defendant's parents. Only then did the agents proceed to the local police headquarters to obtain an extensive written confession. This Court excluded both the oral and written statements, the latter being suppressed because it was tainted by the preceding illegally obtained oral confession; it was taken during an unlawful delay occasioned by the detour to the local police station to get a written statement rather than to a magistrate; and because the written statement actually was a separate confession going far beyond any other admissions made by the accused.

supplied by independent evidence. It is sufficient if substantial extrinsic evidence appears of record which tends to establish the trustworthiness of the confession. See *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 489 (1963); *Opper* v. *United States*, 348 U.S. 84 (1954); *Landsdown* v. *United States*, 348 F.2d 405, 409-410 (5th Cir., 1965); *Whiteside* v. *United States*, 346 F.2d 500, 504-505 (8th Cir., 1965), certiorari denied, 384 U.S. 1023 (1966); *Naples* v. *United States*, 120 U.S. App. D.C. 123, 344 F.2d 508, 513-514 (1964); *Scarbeck* v. *United States*, 115 U.S. App. D.C. 135, 155, 317 F.2d 546, 566, certiorari denied, 374 U.S. 856 (1963); *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962). While some discrepancies do appear in the confession, there are many corroborative facts established, such as the way the deceased was killed, where she was at the time appellant accosted her and the fact that the open empty purse was found in the bathroom where appellant said he took the money. Appellant apparently does not here urge that the confession was not sufficiently corroborated as to the murder count or other circumstances of the robbery but only as to the actual taking of the money. If such specific corroboration is required, we think it was sufficiently fulfilled upon proof of the open empty purse in the bathroom and other circumstances showing that appellant rifled drawers and other places looking for something to steal.

IV

The Court's Instruction to the Jury Concerning the Specific Intent to Steal was Adequate.

(See T. Tr. 57-58, 75, 380, 382-383; Arg. Tr. 26, 47).

Appellant's contention that the court's instruction on specific intent to steal under count three was inadequate (App. Br. 41-46) is unwarranted. Appellant had requested an instruction to the effect that one of the elements of robbery was "a specific intent to steal," that is,

at the time of taking the robber had to have the specific intent to permanently deprive another person of his property. He also sought to have the court characterize the evidence as tending to show that appellant took the money under a good faith belief that it belonged to him and that such belief negatived any specific intent to steal. The court indicated that it would give the substance of the instructions requested "without referring to any of the so-called evidence in the case because I don't comment on evidence" (T. Tr. 380). When the court instructed the jury, it directed that they had to find that the taking "was with the specific intent to steal, that is, to permanently deprive the owner of her property * * *." (Arg. Tr. 47). Appellant made no objection and, while asking the court to clarify some instructions, made no request for amplification on his "good faith taking" theory (Arg. Tr. 62-67). He cannot now complain.

Moreover, we do not believe that this "important defense theory" is realistically presented by the record. Even assuming that appellant thought the deceased owed him money and such belief could under some circumstances negative a specific intent to steal (which is doubtful), we fail to see how the facts here present a jury question concerning the intent to steal based on some good faith ownership theory when entry was made into the home of a 65-year old widow in the middle of the night and the money was taken after suffocating the alleged debtor and ransacking the premises in a general search for money.[12] Appellant's counsel obviously did not consider this a cogent defense to make to the jury since he avoided the subject completely in closing argument. Indeed, he argued to the jury that the alleged debt of $500 mentioned in appellant's statement was a lie and was one inconsistency demonstrating the unreliability of the confession (Arg. Tr. 26). In this context, no error was committed by the court in declining to dignify a patently frivolous assertion with a specific instruction.

---

[12] The evidence showed that appellant had been paid for his work the month prior to the homicide (T. Tr. 57-58, 75, 382-383).

CONCLUSION

Therefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
Assistant United States Attorneys.

RICHARD L. BRAUN,
PAUL C. SUMMITT,
Attorneys,
United States Department of Justice,
Washington, D.C., 20530.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 276778 247

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,994

HARRY GROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

On November 16, 1967 a three-judge panel of this Court reversed and remanded this case for a new trial, holding an initial admission, a ten minute oral confession and a written confession inadmissible as obtained during an unnecessary delay in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.[1] Because we believe the panel decision raises unwarranted limitations on the right of police to investigate an unwitnessed, unsolved serious crime, we ask that the question be considered by the full court.

[1] Appellant had been convicted by a jury of robbery and second degree murder. He was sentenced to imprisonment for a period of fifteen years to life on the murder count and five to fifteen years on the robbery count, to run consecutively.

The facts and Opinion of the Panel

The facts, fully set forth in the government's original brief (G. Br. 3-9), may be summarized briefly as they relate to the *Mallory* issue as follows:

Appellant became one of a number of persons to be interviewed in the instant murder-robbery when police learned from interviews at the scene that he, among others, could have had access to the premises without force.[2] In the late afternoon of the day the body was discovered, Sergeant Buch tried to locate appellant at the home of his mother. Having received an address from the mother, the detectives proceeded there. Appellant was not at home, but the detectives talked with his girl friend. They told her that the police wanted to speak to appellant since he had contact with the house of the deceased and "we were talking to all employees and ex-employees who had access to the house and knew the premises." Appellant was informed of this visit and the purpose of the police when he returned home that night.

The regular detectives assigned to the case quit for the evening around 10:30 p.m. Before leaving, they told night detectives to contact appellant the next morning prior to his leaving for his reported construction job.

About 5:30 a.m. the next morning, two detectives went to appellant's house accompanied by two uniformed policemen. Two went to the front door and two went to the back door. Appellant answered the front door and was told that a statement was desired from him concerning the deceased, that they wanted to know if he had a key to the homicide premises and that they needed fingerprints for the purpose of elimination. Appellant said "all right." His girl friend was also asked to come down to the police station for a statement. At no time were appellant or his girl friend told they were under arrest. Neither was searched. Appellant was not informed that he did

[2] His mother worked for the deceased and had a key. Also appellant had done some painting for the deceased the prior month.

not have to come down to the police station, but on the way to the station, appellant rode unrestrained and alone in the back seat of one of the vehicles. The two detectives rode in the front seat. This was contrary to normal arrest procedure.

They arrived at the police station about 6:30 a.m. Appellant was given free run of the homicide offices. About 7:20 a.m., the regular detective assigned to the case and another detective (Preston) trained in polygraph examinations arrived. They began an interview with appellant to see if appellant would take a polygraph test. Appellant was told that he did not have to take an examination; that it was voluntary; and that he could leave anytime he wanted; that he was not under arrest; and that he could get a lawyer. Appellant said he did not want a lawyer. Appellant indicated he did not want to take a polygraph test. His reason was that he did not want to submit to a broad inquiry into his conduct concerning other possible offenses. After some thirty or forty minutes of conversation, he agreed to a test using questions pertaining only to the homicide. Appellant said that "he had no fear of that, that he was telling the truth." Eleven questions were composed and appellant agreed to take a polygraph test based solely on those questions. About 8:20 a.m., appellant was read a standard warning form,[3] which he initialed. Three polygraph runs were made using the agreed upon questions. The last one was completed about 10:15 a.m. Examination of the charts out of appellant's presence indicated the possibility that he had lied. The detective conducting the test discussed with his superior the best way to use the results to obtain a confession. The detective indicated that at this point appellant would

---

[3] The form contained the following:

> I have been informed of my Constitutional rights and under [sic] that I am not obliged to do or say anything that might incriminate me in any manner and I have a right to secure the advice of an attorney. With full knowledge of those rights I hereby submit to a lie detector test in regard of the following * * *.

not have been allowed to leave, but he was not put under arrest because of lack of probable cause. Instead, appellant was shown the polygraph charts and told that, in the opinion of the detective, he had lied. Appellant examined one of the charts with the detective, noting particular responses and correlating the questions. When it became apparent to appellant that there were marked responses to questions related to the homicide, he became quit emotional and blurted out that "I did it, I know I did it, I'll tell you about it" and "she owed me money." The detective immediately told him "that if he told me about it I would be able to testify to it in court" and placed him under arrest. This occurred about 11:30 a.m. Appellant was then allowed to continue with a ten minute oral account of the crime. A written statement was commenced about 12:15 p.m. and completed about 1:15 p.m. Appellant's written statement implicated the janitor of the deceased who was located and confronted appellant at the police station about 1:15 to 1:30. Appellant was presented before the United States Commissioner about 2:00 p.m.

The trial court concluded on these facts that arrest occurred after appellant made his initial admission. It found that the polygraph tests were made voluntarily when appellant was not under restraint and after he had been advised of his rights. It ruled that the initial admission, the oral confession and the written confession were voluntarily made with full understanding of his rights; and that there was no unnecessary delay in taking appellant before a commissioner. The panel opinion of this Court held that all the confessions were obtained after an undue delay in arraignment within the meaning of *Mallory* v. *United States*, 354 U.S. 449. It regarded appellant as legally in custody from the time he was asked to accompany the police to the station at 5:30 a.m. until the written confession was signed. It further held that at the very least he was in custody from the time the polygraph examination was completed and that the holding

even for the period of time necessary to confront him with the results of that examination was in itself a violation of the *Mallory* rule. It thus ruled inadmissible not only the written confession, and the ten minute oral statement, but even the initial admission "I did it."

Reasons for Reconsideration

The basic error in the panel opinion, we submit, is in treating appellant as a person who had been arrested at 5:30 in the morning. The record clearly shows that, as the trial court found, appellant had not then been arrested. Moreover, he knew that he had not been arrested. While it would have been better had the detectives, who went to appellant's home at 5:30 a.m. to seek his cooperation in eliminating him as a suspect, clearly informed appellant that his cooperation did not have to take the form of going to the police station,[4] we emphasize that this appellant was well aware of his rights and that he knew he was not under arrest. Appellant is a fifty-six year old professional housebreaker and thief of some thirty years' experience. He had prior knowledge that the police were seeking to contact him for a statement as a prior employee of the victim in the instant case. Appellant was not treated as an arrestee on his way to the station or at the station. Before any attempts were made to obtain a statement or a polygraph examination, appellant was told he was not under arrest and was fully warned concerning his rights to silence, to have counsel or, indeed, to walk out of the station.

It was entirely reasonable for police to seek to talk with every person who had access to premises where an unwit-

---

[4] We fail to see the dire significance of the detectives being accompanied by two uniformed policemen and taking the precaution of covering front and rear doors. One of the detectives had knowledge of appellant from a prior homicide investigation and was surprised that he was out on the streets. It is standard procedure for detectives to operate in pairs and to use uniformed policemen as escorts when approaching private premises during hours of darkness.

nessed murder occurred. It was entirely reasonable for them to wish to talk at headquarters and try to persuade every such person to take a polygraph examination for such light as it might shed on the investigation. The record on this case is clear that appellant was told that he was not required to undergo the examination and that he was not under arrest. There is thus no warrant in the record for treating the time appellant was told to come to the police station as starting a period of delay under *Mallory*. The police had no basis on which to arrest appellant then and they knew it.[5] Even more significantly, appellant knew it. If the initial contact of police with a suspect or one of a group of persons who might logically be checked out first before proceeding to other possibilities is to be considered "arrest" for determining unreasonable delay under Rule 5(a), any person questioned at the police station for possible knowledge of an unsolved case must be deemed arrested if he subsequently proves to be the offender. *Cf. Bailey* v. *United States*, Nos. 20,623-4-5, and 20,729, decided December 10, 1967, Slip Opinion p. 15.

Nor do we think the panel was justified in holding that appellant was in custody for the purpose of the *Mallory* rule when the results of the polygraph examination were evaluated. This opinion extends the rule in *Naples* v. *United States*[6]—that *any* post-arrest delay for the purpose of obtaining a confession is unnecessary delay—to the situation where the voluntary pre-arrest interview was not undertaken with the intent or purpose of obtaining a confession, but the intent to try for a confession developed sometime during the interview by interpretation of actions of the suspect himself amounting to less than probable cause. The technique used consisted only of showing appellant the results of the tests he had previously

---

[5] "If appellant's presence and participation in the questioning was voluntary and at a time when no arrest had occurred, the *Mallory* rule is inapplicable." *Fuller* v. *United States*, slip opinion, p. 8.

[6] (No. 20,312, C.A.D.C., decided 7/25/67).

voluntarily undertaken. The instant case is similar to *Fuller* v. *United States*,[7] except that the material used here for confrontation indicated guilt on its face and was developed in the course of the interview while the address book in *Fuller* was subject to innocent explanation and was obtained independent of the interview. Such application strikes at the heart of the unsolved case where no independent evidence as to the identity of the culprit exists. This appellant, for example, is a professional housebreaker. He is reasonably skilled in his profession, leaving no signs of entry, no fingerprints and wearing clothes and shoes that do not leave behind telltale signs. His hours of operation tend to eliminate all witnesses, except the victim. The whole premise of investigations of this type of crime is that suspicion will be gradually created through personal contact and analysis of the reactions of persons within suspect classes. If, as this decision apparently holds, the course of events must be terminated short of probable cause when the police feel a confession will be forthcoming with further contact, this type of investigation is likely to be frustrated, not by lack of or requirements for warnings by police or magistrate, but by the simple interruption and loss of momentum of a process legitimate at its inception. Where, as in this case, physical clues are lacking, crimes cannot be solved other than by questioning persons who, like appellant, might have some knowledge concerning the case. Appellant's statements, for example, are the only evidence that could possibly link him with this crime, and excluding them will plainly result in his going free. We see no legitimate statutory or constitutional policy in significant opposition to the paramount public interest in effective solution of

[7] As we read *Fuller* v. *United States*, No. 19,532 (C.A.D.C.), decided November 20, 1967, it holds in this regard that when the interview is undertaken to get an innocent or guilty explanation of an item of evidence and confrontation with the evidence a "relatively short" time after initial contact results in a spontaneous initial admission of guilt, delay to hear the details of the offense is not unnecessary though occurring after formal arrest.

these types of crimes which often involve murder. The panel's implicit creation of a fictional arrest somewhere between initial contact and completion of the polygraph test as a basis for invocation of *Mallory* was unwarranted and constitutes an extension of *Mallory* justifying rehearing by the full Court.

Moreover, even if the results of the polygraph are deemed to constitute probable cause and appellant could be deemed arrested at that time, we ask the Court to reconsider the holding of the panel that delay for the purpose of confronting appellant with the results amounted to unnecessary delay. At the very least the period of confrontation which resutled in the first admission did not amount to an unreasonable delay. We recognize that the recent enactment of the D.C. Crime Bill (H.R. 10783, 90th Cong., 1st Sess.) which would permit three hours of questioning following arrest before presentment to a magistrate renders this aspect of the opinion less significant for the future. Nevertheless we think the prosecution has a legitimate interest in trying to make certain that a professional criminal who has confessed to a murder does not escape unpunished in a situation where police behaviour was as reasonable as the conduct in this case. While, for the reasons stated above, we do not think it is necessary to reach this question we do urge that, if appellant is deemed to have been arrested when the results of the polygraph were known, there was still no violation of the *Mallory* rule.

CONCLUSION

Accordingly, appellee respectfully requests that the Court rehear this case *en banc*.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

RICHARD L. BRAUN,
PAUL C. SUMMITT,
Attorneys,
United States Department of Justice,
Washington, D.C., 20530.

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

FRANK Q. NEBEKER,
Assistant United States Attorney.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 285795 510